Supreme Court U.S.
FILED
JAN 19 1993
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No. 92-1100

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JEROME J. NORTON,

Petitioner,

—v.—

RICHARD ROSEN AND SUSAN ROSEN and
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court below properly compute the interest to be paid by taxpayers seeking to redeem their property from a tax sale purchaser in holding that interest accrues on the amounts paid by the tax sale purchaser from the dates of each such payment at twenty (20%) compounded daily as set forth in 26 U.S.C. §6337(b)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF FACTS	1
- Background	1
- The Tax Sale	1
- The Redemption	2
- The Proceedings Below	8
- The Decision Below	13
SUMMARY OF ARGUMENT	16
ARGUMENT	17
POINT I	17
PETITIONER HAS NOT DEMONSTRATED SUFFICIENT CAUSE TO BE ENTITLED TO THE WRIT	
POINT II	23
THE COURT BELOW PROPERLY COMPUTED THE INTEREST.	
POINT III	29
THE TENDER WAS REFUSED AT PETITIONER'S OWN RISK	
CONCLUSION	35

SUPPLEMENTAL APPENDIX

		Page
A.	Certified check	1sa
B.	Letter dated September 15, 1986	2sa
C.	Letter dated September 19, 1986	4sa
D.	Letter dated September 23, 1986	5sa
E.	Decision and Order dated January 24, 1991	6sa

TABLE OF AUTHORITIES

Cases and Treatises	Page
Anselmo v. James, 449 F. Supp. 922, 925 (D. Mass. 1978) (dictum)	9, 25
Bohler v. Calloway, 267 U.S. 479 (1925	21
C.J.S. Interest and Usury §58	32
C.J.S. Interest and Usury §60	29
C.J.S. Interest and Usury §61(b)	30
C.J.S. Taxation §877(a)	30
Corbett v. Natt, 77 U.S. 464 (1870)	25
Covington v. Clark, 175 Ca. App.2d 449, 346 P.2d 229 (3d Dist. 1959)	30
Deputy v. du Pont, 308 U.S. 488 (1940)	14, 19
DiFoggio v. United States, 484 F. Supp. 233, 236 (N.D. Ill., 1979)	25
General American Life Ins. Co. v. Anderson, 156 F.2d 615, 626 (6th Cir. 1946)	33

	Page
Guthrie v. Curnett, 417 F.2d 764 (10th Cir. 1969)	25
Howe v. Allied Van Lines, Inc., 622 F.2d 1147, 1160 (3d Cir. 1980)	32
Litwak v. Wolkenberg, 130 A.D.2d 630, 515 N.Y.S.2d 559, 560 (2d Dep't 1987)	32
Miller v. New Jersey Insurance Underwriting Association, 82 N.J. 594 (1980)	20
Mosser v. Moore, 49 S.E. 527 (1904)	30
Murray v. United States, 686 F.2d 1320 (8th Cir. 1982) cert. denied, 459 U.S. 1147 (1983)	33, 34
Northerly Corp. v. Hermett Realty Corp., 19 A.D.2d 594, 240 N.Y.S.2d 709 (1st Dep't 1963)	32
P.R. DeBellis Enterprises, Inc. v. Lumberman's Mutual Casualty Co., 77 N.J. 428 (1978)	19
Rodriguez v. United States, 629 F. Supp. 333, 342 (N.D. Ill., 1986)	25
Security-Connecticut Life Ins. Co. v. National Paragon Corp., 788 F.2d 139, 142 (3rd Cir. 1986)	30

	Page
U.S. v. Eastern Airlines, Inc., 366 F.2d 316, 321 (2nd Cir. 1966)	29
U.S. v. Lowe, 268 F. Supp. 190 (N.D. Ga. 1966) aff'd sub nom Lowe v. Monk, 379 F.2d 555 (5th Cir. 1967)	25

Statutes and Rules

26 U.S.C. §6335(e)(2)(D)	23, 24
26 U.S.C. §6337	2, 9, 13, 17, 20, 21, 23, 26
26 U.S.C. §6622	2, 10
28 U.S.C. §636(c)	9
Rule 10; Rules of the Supreme Court	17

STATEMENT OF FACTS

Background

Respondents, the Rosens, own and reside in a condominium located in Nassau County, New York. The Internal Revenue Services ("IRS") acquired a federal tax lien on their property subject to a then existing first mortgage of $40,008.00. The original amount of the lien was $156,446.34.

The Tax Sale

On April 2, 1986, the tax lien was sold to the petitioner Norton for $137,500.00. Norton paid $30,000.00 of the purchase price for the lien on April 2, 1986. On April 22, 1986, Norton paid an additional $16,000.00. The balance of $91,500.00 was paid on either April 28,

1986 (according to Norton) or May 1, 1986 (according to the IRS).

The certificate of sale was issued to Norton on May 1, 1986.

The Redemption

The Internal Revenue Code ("IRC") provides that a taxpayer has a right to redeem his property from the sale of a tax lien if, within 180 days of the sale (September 29, 1986), the taxpayer pays to the purchaser the amount paid by the purchaser for such lien together with interest thereon at the rate of twenty (20%) percent per annum.[1] 26 U.S.C. §6337(b).

Prior to the tax sale, the Rosens had received a mortgage commitment from

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[1] Effective January 1, 1983, 26 U.S.C. §6622 provides that any interest accruing under the IRC shall be compounded daily.

Fidelity New York to refinance their existing mortgage and obtain a new loan for $187,500.00. The commitment was subject to the subordination of the federal tax lien. An application was made to the IRS for a subordination certificate to subordinate the balance of the tax lien remaining after the sale to Norton. This would insure the mortgagee a first lien on the property. On September 18, 1986, the IRS issued a Conditional Commitment to Subordinate Federal Tax Lien to the mortgagee's counsel. The Certificate states, in part:

> Based on the information furnished, I have determined that the issuance of the certificate will increase the amount the United States may realize.
>
> I will withhold issuance of a certificate of subordination, however, until the taxpayers redeem the real property ... I will, on proper showing of the transferred certificate of sale,

> issue a certificate subordinating the Federal Tax lien outstanding against the taxpayers to the $187,500.00 mortgage issued by Fidelity New York. The last day the property may be redeemed is September 29, 1986.

A closing on the mortgage refinancing was held on September 22, 1986. At that time, based upon a good faith calculation of interest, a **certified bank check** payable to Jerome J. Norton in the amount of **$151,250.00** was issued from the mortgage proceeds. (1sa).

On September 15, 1986, the Rosens' counsel wrote to Mr. Norton:

> They [Mr. and Mrs. Rosen] are prepared to make payment on September 25th, 26th or 29th, 1986.
>
> We would request that you contact the undersigned as to whether you would prefer to pick up the check or have it delivered to your home. We would ask that you deliver back the tax lien receipt given to you by the Internal Revenue

> Service as such return is required by the Government.
>
> In the event you would like your attorney to pick up the check for you, we will reimburse you for your attorney's expense.
>
> In the event we are unable to tender the payment to you by noon on September 29th, 1986, we will tender such payment to the Government as permitted by law.
>
> Please call me so we can arrange whatever payment method would be most convenient to you. (2sa)

Norton responded on September 19, 1986:

> With respect to yours of September 15, 1986, you may deliver the requisite local bank check (payable to my order and not to a third party and endorsed to me) to me at my home located at 220 Summit Way, Syosset, New York on September 29, 1986 at 11:00 a.m. (4sa)

On September 23, 1986, Rosens' counsel again wrote to Norton advising him of the amount of the cashier's check and requesting an earlier tender:

> I am in receipt of yours of 9-19-86. A check was issued to your order on 9-22-86 by Fidelity New York Bank in the amount of $151,250.00 which represents six months interest and the amount of the tax lien.
>
> As interest for the full six months is already included, we would appreciate your cooperation in permitting us to deliver your check sooner than Sept. 29th.
>
> Thank you. (5sa)

Norton refused.

On September 29, 1986, Rosens' counsel and a representative of the title insurance company arrived at Norton's home at the agreed time. The certified bank check was tendered to Norton. Norton stated "I refuse the tender" and closed the door.

Thereafter, still on September 29, 1986, Rosen's counsel wrote to the IRS with an affidavit of the title closer. The letter stated:

> I wish to confirm that the title company is currently holding the bank check payable to Mr. Norton. Pursuant to your directions, after your discussion with Government attorneys, we have made no formal tender of this check to the Internal Revenue Service. You stated to us on Friday, September 26, that the attorneys stated that the holding of the check by the title company is deemed sufficient and therefore no tender would be necessary. Please be advised that we are ready, willing and able to make the tender to the Internal Revenue Service, if necessary.

Thereafter, this action commenced seeking a judgment compelling Norton to accept the redemption and an injunction against delivery of the deed to the premises to Norton.

The certified bank check still remains with the title company for the benefit of Norton. The Rosens have paid principal and interest payments to Fidelity on the refinanced mortgage of $187,500.00 since the closing.

The Proceedings Below

The District Court (McLaughlin, J.), upon plaintiffs' application for a preliminary injunction and defendant Norton's cross-motion for summary judgment found that the Rosens had inadvertently, and in good faith, miscalculated the interest at twenty (20%) percent compounded annually, not daily. This calculation resulted in a deficiency of $498.86 when compared to the interest compounded daily from April 2, 1986 (the date of the tax sale). The Court stated:

> It does not necessarily follow, however, that the deficiency voids the redemption. First, the amount of the deficiency is minuscule in comparison to the interest owed by the Rosens, let alone the sum that they tendered. Second, the underpayment was based [sic] the Rosens' mistaken, but good faith, belief that interest was to be compounded annually. Based on the foregoing, the

> Court concludes that in this case it is proper to invoke the "general rule . . . of leniency to the owner" in an action to redeem real property. Anselmo v. James, 449 F. Supp. 922, 925 (D. Mass. 1978) (dictum). Accordingly, the Court holds that plaintiffs' failure to comply literally with §6337(b)(2) does not invalidate the attempted redemption. (Petition; 49a at 53a)

The Court then found a question of fact as to whether the request for the receipt of the tax sale certificate at the time of the tender was an improper condition.

Thereafter, the Court, on motions for summary judgment by each party, granted Rosens summary judgment and found:[2]

(i) the certified check was a proper method of payment;

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[2] The parties consented to a reference of the action for all purposes to a Magistrate Judge. 28 U.S.C. §636(c).

(ii) Norton did not act in good faith since he was aware of the amount of the check since September 23, 1986 and failed to object thereto in any manner;

(iii) Norton could not claim, therefore, that the tender was conditioned; and

(iv) the inadvertent miscalculation based upon the language of the 26 U.S.C. §6337(a) without regard to the amended 26 U.S.C. §6622 (providing that interest be compounded daily) would not preclude the redemption in light of the "general rule of leniency" and the construction of tax statutes favorable to owners.

However, on January 24, 1991, the District Court, inconsistent with Judge McLaughlin's original order and contrary to its prior findings, found:

(i) the tender was insufficient;

(ii) strict compliance with the statute was required;

(iii) interest is due to the date of actual redemption;

(iv) the amount owed on September 29, 1986 with twenty (20%) interest compounded daily from the date of sale was deficient by $498.86; and

(v) Norton was due to fifteen (15%) percent simple interest on $151,748.86 from September 29, 1986 totalling $249,845.14 through the date of the Courts decision.[3] (6sa).

The Court gave the Rosens twenty-eight days to pay the money or, upon non-payment, summary judgment would be vacated and the complaint dismissed.

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[3] The petition does not contain this Order.

The Rosens moved to alter the judgment claiming that the calculation of interest compounded daily at twenty (20%) percent per annum from the dates of payment by Norton of the purchase price for the tax sale certificate[4] resulted in an overpayment on September 29, 1986.[5]

The District Court (Jordan, M.J.) modified its order and reduced the post-tender interest rate to the average prime rate computed annually. This reduced the amount required to redeem the property to $213,959.95. Payment was not timely made and the Court vacated the summary judgment and dismissed the complaint.

---

[4]

April 2, 1986	$ 30,000.00
April 22, 1986	$ 16,000.00
April 28, 1986 (or May 1, 1986)	$ 91,500.00
	$137,500.00

[5] The Rosens had previously made this argument to Judge McLaughlin who did not address this issue in this Decision and Order.

Norton then moved to amend the judgment to obtain use and occupancy of the premises by plaintiff since September 29, 1986.

After a hearing, the Court amended the judgment to award Norton $84,035.65 for use and occupancy of the premises through January 1, 1992.

The Decision Below

On appeal, the Court below reversed. The Court stated:

> It is correct that the Rosens did not use the proper method of calculation, but their error in calculating the amount of the tender actually resulted in an overpayment, not a deficiency. The district court erred by calculating daily interest on the entire purchaser price from the date of sale (April 2, 1986), instead of from the date each payment was made to the IRS. Section 6337(b)(2) of Title 26 provides that the price of redemption is "the amount paid by such purchaser and interest thereon at the rate of

> 20 percent per annum". Plainly, the "amount paid" by Norton was $30,000 on April 2, 1986, $26,000 on April 16, 1986 and $91,500 on April 28, 1986, and it is only on these sums and from these dates that Norton was entitled to interest.
>
> The plain language of this section also comports with common sense. Since interest is "compensation for the use or forbearance of money", *Deputy v. du Pont*, 308 U.S. 488, 498 (1940), it would be anomalous to allow Norton to recoup compensation for monies not yet used. Norton therefore was entitled to daily interest on $30,000 for 180 days (April 2 to September 29), on $16,000 for 166 days (April 16 to September 29) and on $91,500 for 154 days (April 28 to September 29).

The matter was remanded with the direction to enter a judgment ordering Norton to accept the tender of the certified check for $151,250.00 delivered to the title company and to deliver the certificate of tax sale upon such tender.

The Court below denied rehearing and refused the suggestion for rehearing in banc.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that interest due to Norton to redeem their residence was only due from the date that Norton expended his funds to purchase the tax lien. The payment tendered, though mistakenly and inadvertently calculated using annual compounding of interest, was $1,064.00 in excess of the amount actually due.

Since there was a perfect tender by certified funds there was no "conditionality" of payment. Therefore, Norton's refusal of the tender was wrongful, abating all further interest.

Norton's refusal to deliver the tax sale certificate upon the tender was improper.

ARGUMENT

POINT I

PETITIONER HAS NOT DEMONSTRATED SUFFICIENT CAUSE TO BE ENTITLED TO THE WRIT

The petitioner must demonstrate special and important reasons to obtain the writ sought. (Rule 10). These include a conflict among courts of appeal; that the decision sought to be reversed is in conflict with a state court of last resort, or is an extreme departure from usual judicial proceedings.

Petitioner claims the issues decided below are of extreme federal importance and seeks to demonstrate conflicts with other court findings.

No such conflict exists. The decision below simply interprets the plain language of 26 U.S.C. §6337(b) holding

that upon a redemption of property by a taxpayer, interest accrues from the date of payments of the purchase price paid by a tax lien purchaser.

The purported conflict with other courts does not exist or is not sufficient to mandate the issuance of the writ.

There is no dispute as to the rate of interest or to the timeliness of the tender. Regardless of a characterization of the interest as a penalty or compensation for the use of money, the result is the same based upon the statutory language. In either event, if the taxpayer is ready, willing and able to tender the proper amount, whether as a penalty or compensation for the use of the tax lien purchaser's money, if the proper

tender is made, redemption is automatic.[6]

Deputy v. du Pont, 308 U.S. 488 (1940) is not in conflict. Rather it is totally irrelevant to the issue herein. Therein, this Court decided whether expenses incurred in consideration of a shareholder borrowing stock which was repaid by the return of the shares and the amount of dividends declared plus taxes incurred by the lender were "ordinary and necessary" business expenses and therefore tax deductible by the borrower and taxpayer.

Similarly, P.R. De Bellis Enterprises, Inc. v. Lumberman's Mutual Casualty, Co., 77 N.J. 428 (1978) is irrelevant to the issue herein. Therein, the court found that the purchaser of a

---

[6] There is no windfall to the taxpayer. He is still paying twenty (20%) percent interest annually, compounded daily.

tax lien did have an insurable interest in the property such that it could purchase a fire insurance policy on the premises and, upon a fire, collect on the policy. The value of the interest insured, however, was not the fair market value of the premises or the value stated in the insurance application. The value was limited to the amount paid the insured when the tax lien was bought from the government. No discussion is set forth therein as to the computation of interest to be paid by a taxpayer seeking to redeem its property pursuant to 26 U.S.C. §6337(b).

Miller v. New Jersey Insurance Underwriting Association, 82 N.J. 594 (1980) cited by petitioner is similarly irrelevant. It holds that if a real estate tax is foreclosed without prior notice to the taxpayer (no attempt was

made by the taxing authority to mail the notice to the known taxpayer who continued to occupy the premises) and the redemption period has expired, the property owner still had an insurable interest in the property and, therefore, could collect under a fire policy after a loss occurred. There is no discussion of interest accruing under 26 U.S.C. §6337(b).

Bohler v. Calloway, 267 U.S. 479 (1925) is similarly miscited. Therein, the taxpayer tendered only a **portion** of the assessment he admitted was due and refused to pay the full amount. He demanded a full release and when he was refused, did not make **any** payment. Herein, Rosen tendered in excess of the full amount by certified bank check.

Accordingly, no conflict is shown nor is there shown an extreme departure from usual judicial proceedings.

Petitioner has failed to demonstrate sufficient cause for this Court to issue the writ requested.

POINT II

THE COURT BELOW PROPERLY COMPUTED THE INTEREST DUE

26 U.S.C. §6337(b) provides in relevant part:

> (1) Period. - The owners of any real property sold as provided in Section 6335 . . . . shall be permitted to redeem the property sold, ... at any time within 180 days after the sale thereof.
>
> (2) Price. - Such property . . shall be permitted to be redeemed upon payment to the purchaser . . . . the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum. (26 U.S.C. §6337(b) (emphasis added)

The amount "paid by such purchaser" is $30,000.00 on April 2, 1986; $16,000.00 on April 16, 1986; and $91,500.00 on April 28, 1986. The purchaser had deferred payment for thirty days pursuant to 26 U.S.C. §6335(e)(2)(D).

The argument urged by petitioner results in an effective rate of interest in excess of twenty (20%) percent on "the amount paid [by] purchaser" that is allowed by statute!

The following example illustrates this point: if an owner offered to redeem property sixty days after the tax sale and the tax lien purchaser had deferred payment for the full thirty days from the date of sale, interest calculated from the date of the tax sale would amount to almost forty (40%) percent! This could not have been the intention of Congress.

The notice of sale and 26 U.S.C. §6335(e)(2)(D) provide for up to one month to pay the purchase price but do not provide how interest should accrue on such installments.

In the absence of any clear statutory language or legislative intent, the Court

should construe the statute most favorable to the owner. Corbett v. Natt, 77 U.S. 464 (1870); Anselmo v. James, 449 F. Supp. 922 (D. Mass. 1978); U.S. v. Lowe, 268 F. Supp. 190 (N.D. Ga. 1966) aff'd sub nom Lowe v. Monk, 379 F.2d 555 (5th Cir. 1967).

"Courts have traditionally looked with favor upon redemption and have given liberal construction to redemption statutes". DiFoggio v. United States, 484 F. Supp. 233, 236 (N.D. Ill., 1979). "In the words of one court '[f]rom the earliest time this right [of redemption] has been clearly recognized and jealously guarded by United States Courts.'" (citations omitted). Rodriguez v. United States 629 F. Supp. 333, 342 (N.D. Ill. 1986).

In Guthrie v. Curnett, 417 F.2d 764 (10th Cir. 1969), the Court held that if

the purchaser of the tax lien wrongfully frustrated the owners' attempts at redemption, payment of the redemption price to the IRS agent was proper.

Herein, plaintiffs have continued to do everything possible to redeem their property. They applied for a mortgage to obtain the necessary funds; they obtained a subordination of the balance of the tax lien to the new mortgage from the IRS; they computed interest on the amount paid through September 29, 1986 as provided for in 26 U.S.C. §6337(b)(2); they requested an earlier tender and were denied; they made a complete tender and were refused; and they deposited the money with the title company and lost all claim or benefit to it.

Justice, equity and compassion require that a speculator, preying on the misfortune of others; who prevents a

tender until the final moments of the redemption period; who fails to notify the plaintiffs of any deficiency he believes existed when notified of the amount to be tendered; and who fails to explain his refusal so that any defect could be timely cured should not be rewarded.

In addition to the legal and equitable considerations, important policy considerations exist as well.

In issuing a commitment to subordinate its tax lien to the new refinanced mortgage, the District Director of the IRS stated:

> Based on the information furnished, I have determined that the issuance of the certificate will increase the amount the United States may realize.

The United States will realize a substantially greater amount because of the holding below. The balance of any

equity in the premises above the new mortgage is available for tax payments. If the Court reverses the judgment, the deed will be issued transferring title to Norton. This will extinguish such equity.

The tender being sufficient and the District Court having subsequently found that Norton's bad faith could not justify reliance on any condition of payment (6sa), the tender was in all respects proper and, therefore, effected a valid redemption.

POINT III

THE TENDER WAS REFUSED AT PETITIONER'S OWN RISK

Petitioner argues that if the amount is in dispute, he can refuse a tender and pursue a determination in a court of law as to the proper amount.[7]

The general rule is that the running of interest will be suspended if the debtor makes proper tender at the appointed time and place, even if such tender is refused. C.J.S. Interest and Usury §60, U.S. v. Eastern Airlines, Inc., 366 F.2d 316, 321 (2nd Cir. 1966) (where obligation to pay interest was suspended upon proper tender that was refused).

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[7] Petitioner, below, argued the tender was conditional because it was made by a certified bank check. This argument is not presented in the petition.

In order for tender to be proper, it must be (1) for the full amount the purchaser is entitled to receive[8]; (2) made in due time and manner; and (3) unconditional. C.J.S. Taxation §877(a).

In addition to the above requirements, the debtor must also place the tender beyond his own use at the time of tender. C.J.S. Interest & Usury §61(b). Security-Connecticut Life Ins. Co. v. National Paragon Corp., 788 F.2d 139, 142 (3rd Cir. 1986). Deposit with a title company is sufficient to satisfy this requirement, thus suspending the running of interest. Covington v. Clark, 175 Cal. App.2d 449, 346 P.2d 229 (3d Dist. 1959) (wherein vendors were not entitled to interest as money was tendered

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[8] "A small deficiency in the amount tendered for redemption from a tax sale, attributable to mistake, will not vitiate the tender . . ." C.J.S. Taxation §877, citing Mosser v. Moore, 49 S.E. 537 (1904).

to title company on date of closing for the purpose of tender).

Herein, the Rosens have met the three criteria for proper tender as set forth above: (1) the payment is either sufficient, or has been found to be valid despite the $498.86 deficiency, which the District Court found to be "minuscule"; (2) the Rosens' representatives were present at the appointed time and place for tender; and (3) the payment was unconditional and in proper form.

Furthermore, the Rosens placed the tendered money with Congressional Abstract, a title company, and have not had the use thereof since the date of tender. Thus, they have also met the second requirement for proper tender - that the money be placed beyond their use.

As the Rosens have done everything in their power to effect a redemption, the

accrual of additional interest cannot fall on them. C.J.S. Interest & Usury §58, citing Northerly Corp. v. Hermett Realty Corp., 19 A.D.2d 594, 240 N.Y.S.2d 709 (1st Dep't 1963).

The District Court found that Norton did not act in good faith by his refusal of the tender without explanation and by his failure to object to the amount to be tendered when he knew the actual amount of the check days earlier.

In Litwak v. Wolkenberg, 130 A.D.2d 630, 515 N.Y.S.2d 559, 560 (2d Dep't 1987), the Court stated:

> The defendants, having provided no basis for their refusal of the accurately computed tender, are thus not entitled to recover interest upon the principal from the plaintiffs for the period subsequent to the initial tender.

See Howe v. Allied Van Lines, Inc., 622 F.2d 1147, 1160 (3d Cir. 1980);

General American Life Ins. Co. v. Anderson, 156 F.2d 615, 626 (6th Cir. 1946).

Herein, the tender was made and refused. The funds were then deposited with the title company for the benefit of Norton pursuant to the instructions of the IRS.

In fact, the Rosens have been paying monthly mortgage payments of principal and interest to Fidelity on the mortgage they procured to obtain the funds for redemption.

Accordingly, the payment was sufficiently tendered in all respects and interest stopped accruing on September 29, 1986.

Norton had no right to refuse the tender and did so at his own risk.

Petitioner cites Murray v. United States, 686 F.2d 1320 (8th Cir. 1982)

cert. denied, 459 U.S. 1147 (1983) to show that the demand for the tax sale certificate upon payment was a condition and therefore improper.

Murray, id., is not authority for such position. Therein, the Court dismissed the action finding a lack of subject matter jurisdiction because 'there was no sufficient waiver of sovereign immunity by the government in the action that was pleaded therein.

In any event, the return of the tax sale certificate is required upon redemption, was required by the IRS in subordinating its lien to the new mortgage and was the consideration, not a condition, for the tender.

CONCLUSION

The writ should be denied and the petition dismissed. There is no showing of any special or important reasons; there is no conflict with other courts of appeal or state courts of last resort; and on the merits, the opinion below was properly decided.

Respectfully submitted,

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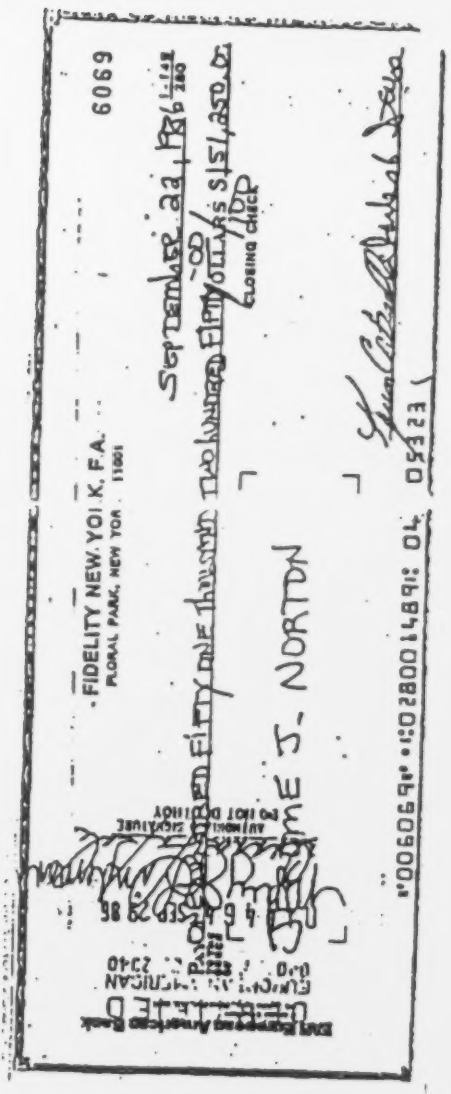
Attorney for Respondents
Richard Rosen & Susan Rosen
666 Old Country Road
Garden City, New York 11530
(516) 228-6666

Dated: Garden City, New York
January 19, 1993

SUPPLEMENTAL APPENDIX

Supplemental Appendix A
Certified Check



BEST AVAILABLE COPY

Supplemental Appendix B
Letter dated 9/15/86

KATZ & BERNSTEIN
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

September 15, 1986

Jerome Norton
220 Summitt Way
Syosset, New York 11791

Dear Mr. Norton:

We are writing to you as purchaser of a tax lien in the amount of $137, 500 on the home of Richard and Susan Rosen at 67 Hidden Ridge Drive Syosset, New York.

They are prepared to make payment on September 25th, 26th or 29th, 1986..

We would request that you contact the undersigned as to whether you would prefer to pick up the check or have it delivered to your home. We would ask that you deliver back the tax lien receipt given to you by the Internal Revenue Service as such return is required by the Government.

In the event you would like your attorney to pick up the check for you, we will reimburse you for your attorney's expense.

In the event we are unable to tender the payment to you by noon on September 29th, 1986, we will tender such payment to the Government as permitted by law.

Please call me so we can arrange whatever payment method would be most convenient to you.

Very truly yours,

KATZ & BERNSTEIN

S/

EDWIN A. BERNSTEIN

EAB:cb
REGISTERED MAIL
RETURN RECEIPT REQUESTED

REGULAR MAIL

Supplemental Appendix C
Letter dated 9/19/86

Jerome J. Norton
220 Summit Way
Syosset, New York 11791

September 19, 1986

Katz & Bernstein
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

ATT: EDWIN A. BERNSTEIN, ESQ.

Dear Mr. Bernstein:

With respect to yours of September 15, 1986, you may deliver the requisite local bank check (payable to my order and not to a third party and endorsed to me) to me at my home located at 220 Summit Way, Syosset, New York on September 29, 1986 at 11:00 a.m.

I shall deliver up the tax receipt upon collection of the check.

Yours truly,

S/

Jerome J. Norton

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
P324 145 274

Supplemental Appendix D
Letter dated 9/23/86

KATZ & BERNSTEIN
Attorneys at Law
66 North Village Avenue
Rockville Centre, New York 11570

9-23-86

Mr. Norton:

I am in receipt of yours of 9-19-86. A check was issued to your order on 9-22-86 by Fidelity New York Bank in the amount of $151,250 which represents six months interest and the amount of the tax lien.

As interest for the full six months is already included we would appreciate your cooperation in permitting us to deliver your check sooner than Sept. 29th.

Thank you.

S/ Ed Bernstein

My Home No. is
516 593 6708

Majestic Messenger

Supplemental Appendix E
Decision and Order dated 1/24/91

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

Filed
1/24/91

RICHARD ROSEN AND SUSAN ROSEN,

Plaintiffs,

CV 86-3369
(DFJ)

- against -

DECISION
AND ORDER

JEROME J. NORTON AND THE
UNITED STATES OF AMERICA,

Defendants.
----------x

Pursuant to the Decision and Order herein dated and filed December 3, 1990, defendant Jerome J. Norton has submitted his calculation of the amount of money necessary to redeem the subject property herein from the certificate of sale which he holds. The only response from the plaintiffs has been a Notice of Appeal from the denial of their demand for an inquest as to damages and from the award of additional interest to Mr. Norton.

The plaintiffs are not entitled to money damages.

First, their complaint contains a single cause of action invoking federal jurisdiction under 26 U.S.C. §6337(b) and 28 U.S.C. §2410. Neither statute provides for money damages. 28 U.S.C. §2410 provides a basis for federal jurisdiction in an action to quiet title to property on which the United States has a lien. U.S.C. §6337 provides a procedure for the redemption of property from a federal tax lien. There is no provision in either statute for the recovery of money damages. No known decided case supports such a claim. The decided cases appear to informally hold that upon timely and sufficient tender of the required amount, the owner is entitled to redeem his property. Nothing more.

Second, Courts have held that where, as here, an owner's right to redeem is a creature of statute, there can be no redemption absent strict compliance with the statute. See, e.g., Silver Bell Indus., Inc. v. United States, 74-2 U.S.T.C. para. 9691 (D. Colo. 1947), aff'd, 76-1 U.S.T.C. para. 9432 (10th Cir. 1976) (plaintiff's redemption held improper due to untimeliness in payment, use of personal check and inadequacy of tender in the amount of $32.98); Fitshugh v. Ryles, 517 F.Supp. 1361 (E.D. Ark. 1981) (plaintiff's tender of an "envelope draft" was held not to be an adequate method of payment): Anselmo v. James, 449 F. Supp. 922 (D. Mass. 1978) (court held that the federal courts are unable to extend time to redeem beyond the 180-day period).

In the case at bar, plaintiffs' tender was insufficient, as held by Judge McLaughlin and by this Court. Judge McLaughlin permitted it because it would be (sic) been inequitable otherwise, when one compared the amount still owed, $498.86, to the total amount actually due, $151,748.86. This Court also found that it would be inequitable to decide differently, because of the defendant's prior knowledge on September 23, 1986, of the amount to be tendered by the plaintiffs on September 29, 1986. See United Gas Pipe Line Co. v. Tyler Gas Service Co., 162 F. Supp. 496, 501 (E.D. Texas 1958). However, both courts correctly cited the fact that the plaintiffs were not in strict compliance statutorily, neither was the defendant in compliance equitably. It was based on

this reasoning that this Court granted plaintiffs' summary judgment motion, and not because they completely satisfied Section 6337.

In sum, the plaintiffs have been granted the equitable relief of being given an additional opportunity to redeem their property. They have not demonstrated any right to the legal remedy of money damages.

Further, Mr. Norton is entitled to interest to the date of actual redemption. The plaintiffs have had not only the use of the real estate, but also the use of this money.

Turning to the amount necessary to redeem the property, the amount calculated by the defendant is based upon the rate provided in the Internal Revenue Code. 26 U.S.C. 6331. However, that rate was no

longer applicable after the defendant defaulted by failure to deliver up the certificate of sale. Research has failed to disclose any federal rule governing the rate of interest to be applied after a default but before judgment. Accordingly, the applicable New York State Rule governs this case. In New York it is well settled that, after default, the rights of the parties are governed not by their agreement, but by the law. People ex rel Emigrant Savings Bank v. Sexton, 284 N.Y. 57, 62, 29 N.E.2d 469 (1940). Accordingly, Mr. Norton is entitled to prejudgment interest at the legal rate rather than Internal Revenue Code interest.

In federal question cases, absent statutory directive, the right of prejudgment interest is left to the

court's discretion. Orshan v. Macchiarola, 629 F.Supp. 1014, 1017 (E.D.N.Y., 1986) (Neaher, J.) and cases cited therein. In that case Judge Neaher looked to the prime interest rate for guidance in fixing the rate at which prejudgment interest should accrue. This appears to be sound for the reasons stated by him. In the present case, where prejudgment interest has been accruing for more than four years, application of the fluctuating prime rate is impractical. Inasmuch as the rate is left to the discretion of the court, it is fixed at fifteen (15%) percent per annum.

The parties agree that the amount tendered on September 29 1986, was $151,250.00, and that this amount was deficient by $498.86. Accordingly, the amount owed on that date was $151,748.86. Computing simple interest thereon at the

rate of 15% per annum from that date through January 17, 1991, the prejudgment interest amounts to $98,096.28 and the amount owed as of January 17, 1991, is $249,845.14.

Accordingly, the amount to be paid by the plaintiffs to Jerome J. Norton on or before January 17, 1991 is fixed at $249,845.14. The plaintiffs are also afforded the right to redeem the property by February 28, 1991, by paying additional interest at the per diem rate of $62.36 through the date of payment.

Upon the delivery by the plaintiffs Richard Rosen and Susan Rosen to the defendant Jerome J. Norton a certified check or cash equivalent for the sum of $249,845.14, plus any accrued per diem interest, Mr. Norton is directed to

immediately deliver up to the plaintiffs the certificate of sale of the subject property which he holds.

The Clerk is directed to enter judgment accordingly, with costs to the plaintiffs against the defendant Jerome J. Norton only.

Should this payment not be made by February 28, 1991, upon notice to the court and the plaintiffs by defendant Jerome J. Norton, a further order will be issued directing the vacatur of that judgment and the entry of judgment in favor of defendant Jerome J. Norton and against the plaintiffs dismissing their complaint, terminating all temporary restraining orders, and directing that the United States of America issue a good and

satisfactory deed to the subject premises to the said defendant Jerome J. Norton.

SO ORDERED.

Dated: Hauppauge, New York
January 24, 1991

S/

DAVID F. JORDAN, U.S.M.J.